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Supreme Court of the United States

October Term, 1949—No. 306

LOUIS A. JOHNSON, Secretary of Defense of the United States, *et al.*,

Petitioners,

vs.

LOTHAR EISENTRAGER, alias LUDWIG EHRHARDT, on his own behalf and as next friend of FRANZ SIEBERT, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Statement of Case.

The prisoners are German nationals who, during World War II, were engaged in admittedly legal activities on behalf of their native land in conjunction with one of its Allies. They are 21 civilians, two of whom were in the German Embassy and Consular Service in Japanese occupied China,—two of whom were in the German Information Bureau, an agency of the German Embassy,—one of whom was in the German News Agency known as "DNB",—and the remaining sixteen of whom were in an intelligence office known as "Bureau Ehrhardt" (R. 10-11).

Their activities were legally, and properly conducted within the rules of warfare in the cities of Shanghai, Canton and Peiping—all of which were in that part of China that was occupied by the armed forces of Japan (R. 4).

After the war between the United States and Japan came to an end on August 15, 1945, the prisoners were

arrested, charged with violation of the laws of war, tried and convicted by an American Military Commission (R. 4-7). The gist of the allegations was that the prisoners had continued their activities on behalf of Japan after the surrender of Germany on May 8, 1945, and that the activities which had been legal prior to May 8, 1945, became illegal after that date by reason of the document signed by "Friedeburg", "Keitel", and "Stumpff" which purported to surrender "all forces on land, at sea, and in the air", who were on that date "under German control". In short, the prisoners were charged with having continued to fight on the side of one of their surrendered country's allies as did the Free French, Poles, Belgians, Dutch, Filipino guerrillas and others who have not been tried as war criminals, but who have been hailed as heroes for their patriotic constancy (R. 3-5, 26-48).

The charge, evidence, and proof show that prisoners were not under the "control" of the surrendering parties, but were at all times in Japanese-occupied territory. The charge does not allege that the prisoners were ordered to surrender, but on the contrary the charge (as implemented by a Bill of Particulars) alleges that they were ordered to "furnish aid and intelligence to the Japanese armed forces" (R. 36-48).

Although all hostilities had long since ceased, and there was neither military government or occupation nor a declaration of martial law in China, the prisoners were tried together in a common trial by an American Military Commission set up in a friendly soverign state in violation of treaty and international law. The trial was conducted without regard to the rules of evidence or the rights of an accused to a fair and impartial trial as guarantged by treaty, by international law, and by the Statutes and Constitution

of the United States (R. 5, 48-57). The prisoners were sentenced to imprisonment for terms ranging from two years to life, and the sentences were confirmed and ordered executed, not by a field commander engaged in the prosecution of war, but by the Chief of a United States Army "Advisory Group", whose sole status in China was that of technical advisor to a friendly government (R. 8, 57-62).

The prisoners were shipped, after sentence, to Landsberg Prison in the American occupation zone in Germany, where they are now confined. They brought this petition for a writ of habeas corpus in the District Court of the United States for the District of Columbia, to test the validity of the trial and convictions. Their immediate custodian is subordinate to and answerable to your present petitioners. Unlike other applications for the writ that have recently been brought before American courts, there is not here involved any International Tribunal or Allied Military Government Tribunal. We have here (as in *Ex Parte Quirin,* 317 U. S. 1 (1942) and *In re Yamashita,* 327 U. S. 1 (1946)) a purely American military commission set up under the purported authority of an agency of the United States alone.

The District Court (TAMM, J.) dismissed the petition for lack of jurisdiction and consequently did not reach the question whether the petition stated a cause of action for the relief sought (R. 21-22). Upon appeal, the United States Court of Appeals for the District of Columbia Circuit reversed Judge TAMM and held that the district court has jurisdiction to grant the writ, despite the fact of confinement outside the District, where personal jurisdiction is obtained within the District over persons who have directive power by line of authority over the jailer. The Court of Appeals, however, did not make a final disposition of the

case. The Court held that the record appeared to disclose questions of fact and law which would have to be disposed of in the District Court before a final decision or, indeed, even a decision upon the sufficiency of the petition, could be rendered. The Court of Appeals consequently remanded the case for further proceedings (R. 82).

Respondent then moved for rehearing, requesting the Court of Appeals to pass upon the merits of the petition (R. 84-85). This motion was denied (R. 86).

ARGUMENT.

1. Certiorari should be denied because the case is not ripe for Supreme Court decision.

A. The record does not present a final order.

The decision of the United States Court of Appeals for the District of Columbia Circuit did not finally dispose of the case. The Court ordered the matter remanded to the District Court for further proceedings (R. 82). These further proceedings involve

(1) "the controlling issues of *law*"—to use the language of the Court below (R. 82)—*i. e.*, the basic issue on the merits; as well as

(2) issues of *fact* that may or "may not remain" after disposition of legal issues (R. 82). Conceivably these questions of fact go even to the question of the jurisdiction of the District Court, because the Court of Appeals pointed out that "upon its further consideration of the case, the District Court may find that one or more of respondents have no directive power by line of authority, over the jailer * * * " (R. 82).

B. Cognizant of this situation, respondent petitioned for rehearing, which motion was denied.

After the decision by the Court of Appeals, respondent petitioned that Court to give consideration to and make disposition of the fundamental legal issues that were left undecided (R. 85). Respondent pointed out that the legal question of sufficiency of the petition was before the Court of Appeals and was necessarily presented for adjudication assuming that the jurisdictional point had been disposed of (R. 84). The Court below, however, denied the petition for rehearing without stating its reasons (R. 86).

It may be that the Court of Appeals did not agree with the respondent's contention that there were in reality no remaining questions of fact (R. 85), in which case it would appear to be essential that such fact questions be disposed of before the Supreme Court be asked to act. Or it may be that the Court of Appeals did not desire to decide the merits in advance of some consideration by the District Court. Viewed in this light, the Supreme Court is either being asked to make a final decision on the merits without benefit of consideration by the District Court or the Court of Appeals—or the Supreme Court is being asked to decide this case piecemeal.

C. A piecemeal decision should be avoided.

If the Supreme Court should act favorably on the petition for writ of certiorari and then if upon consideration of the matter this Honorable Court should uphold the decision of the Court below, there would still be no final disposition. The case would then presumably again run the full course of judicial determination, eventually reaching the Supreme Court a second time. Not only would such a proc-

ess involve the administrative problem of piecemeal decision, but it would subject the prisoners to a heavy financial burden that they cannot afford to bear, and it would result in unnecessary and protracted delays.

In other words, granting of the writ of certiorari may work irreparable damage upon the prisoners. Denial of the writ cannot possibly harm the Government. The prisoners are neither freed nor are they on bail. They remain in custody,—and presumably that status will be unchanged no matter what the final decision as to the jurisdiction of the District Court. If the legal position taken by the respondent is correct, then the prisoners should be released as soon as possible and without the unnecessary delay entailed in a piecemeal disposition of their claims. If, on the other hand, their position eventually proves untenable, they simply remain incarcerated—as at present.

2. Certiorari should be denied because the Court below was not in error.

Assuming that the United States Court of Appeals for the District of Columbia Circuit did decide that the United States District Court for the District of Columbia definitely has jurisdiction to hear this case, respondent does not maintain that this does not raise an issue of sufficient importance for disposition by this Honorable Court. We do maintain, however, that such finding by the Court of Appeals was so eminently proper that there is no necessity for disturbing it. The opinion of PRETTYMAN, J., for the Court below, together with the concurring opinion in *Hirota* v. *MacArthur*,

No. 239, Misc. 1948 Term, decided June 27, 1949,—by the author of the opinion in *Ahrens* v. *Clark*, 335 U. S. 188 (1948), should make further elaboration unnecessary.

Respectfully submitted for the Respondent,
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